

# The Mountain Torch



December 2009  
Newsletter

## Always Free?

By Franklin Crabtree  
Executive Director



If we build it, they will come.

In January, the Governor entered an Executive Order creating *The Governor's Commission on Prison Overcrowding*. The ensuing report, probably the most comprehensive 'civilian' review of the state criminal justice/corrections system in recent history, surfaced in June. Importantly (but not surprisingly), the Commission found West Virginia "on the 'tipping point' of serious repercussions stemming from insufficient institutional corrections resources and the resulting stressful impact upon our regional jails."

The Commission recommended an "action agenda" of 14 measures to address immediate and long-term needs, and it emphasized the urgency of state action. Primary among these: the use of alternative sanctions for low offense level felons; shortening incarceration; and providing rehabilitation for lower risk offenders; and – you guessed it – building a new 1,200 cell prison and providing hundreds more new "prison beds" that are already in the pipeline.

Some operative facts: the state Division of Corrections currently maintains facilities with an inventory of 5,015 prison beds. But,

at present state courts have sentenced 6,300 offenders to 'do time' in state prison facilities, and this number grows by approximately three offenders per day. This 1,300 bed deficit is absorbed by a severely overcrowded regional jail system. State prisoners in the regional jail holding pattern have little or no access to the services and treatments which prepare them for re-entry into the community, and as a result offenders serve a greater percentage of their sentences than would otherwise be required.

Other committee findings enter into its appeal for urgency. WV ranks dead last among all states in the use of community corrections (probation, parole, home confinement) as a prison alternative. In other states, the ratio of offenders on community supervision versus prison supervision is commonly 2.5 or 3 to 1. In WV, the ratio is one to one. Moreover, while the state has one of the lowest incarceration rates among the states, it has one of the highest increasing rates of prison *growth* -- seven percent annually. At this rate, the Committee concludes, by the end of 2012, WV will be housing 8,530 offenders, with the number growing to 10,304 by 2017. WOW, just when we were looking for another growth industry!

Incarceration as a means to control behavior in this country has experienced virtually blind acceptance in the last 35 years. We are truly Number One in the world in the prison population category, with over two million folks locked up. Put in another context, the prison population in the United States of America accounts for 25 percent of the world's prison population and it exceeds that of 26 European nations combined!!

Since 1975, the U.S. incarceration rate has increased from 100 inmates per 100,000 population to over 700 per 100,000. Prior to this, the prison rate fairly matched population growth. The several reasons for this phenomenon do not include increased rates of garden variety crime. The reasons do include the bipartisan political stampede to be "tough on crime." In the practical application of this mantra, lawmakers defined more and more activities as crimes and legislated mandatory minimum sentences, the

abolition or restriction of parole possibilities, and "three strikes" laws which are responsible for locking people up for life for third strikes as minimal as shoplifting a VCR or stealing a slice of pizza.

The poster child for this national fanaticism with crime and punishment might well be Ronald Reagan and his 1982 *War on Drugs*. With this jump start from "The Gipper," resultant drug laws and convictions on state and federal levels sent incarceration rates through the roof. Between 1985 and 1995, drug convictions alone accounted for approximately 80 percent of the increase in the federal prison population. In the last 20 years, give or take, drug arrests have increased by 50 percent, with more than 17 percent of all U.S. prisoners serving time for drug offenses. As recently as 2008, four of five drug-related arrests were for possession, not distribution. And the drug of choice in half of these arrests – marijuana.

Luckily for the political leaders who waged this war, most of its Draconian impact has fallen on those who seldom vote -- young, poor men of color. During the pitch of this battle, the number of black drug offenders grew at a rate four times that for whites. Not astonishingly, the imprisonment rate for all U.S. males is one in 54; for Latino males it is one in 36; and for black males it is one in 15. Astonishingly, blacks serve an average of 58.7 months in prison for *drug offenses*, while whites serve only an average of 61.7 months for *violent crimes*. Hello: does anyone believe that if 7.5 percent of the white male population in the U.S. were incarcerated that corrections system demographics would look the same?

By any reasonable calculation, the "War on Drugs," while a reliable campaign strategy, has failed both as a crime deterrent to drug use (1.7 million drug arrests in 2008), and as a public health measure (twice as many drug-related deaths today as 1982). And but for the private prison-construction-and-operation industries (you can meet them at the State Capitol in January), the financial

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# President's Corner

By Bill Denman  
ACLU-WV Board President

**W**e are in the midst of our annual

election of Board members for the ACLU of West Virginia, and you are asked to vote for up to five people to serve three-year terms. We elect one-third of our board members each year.



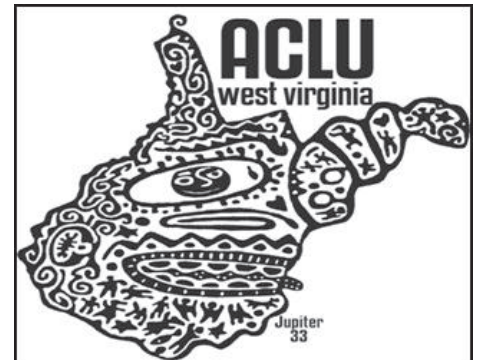
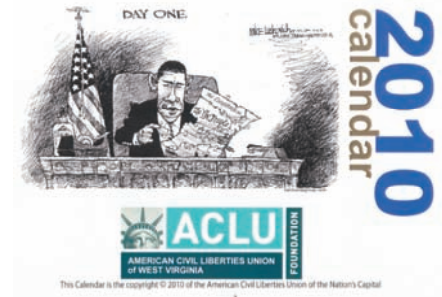
The people you elect will actually serve on both the Union board and the Foundation board. These boards have all the same officers except for one — the VP of Development, who serves on the Foundation board, and the VP for membership who serves on the Union board. Both boards meet consecutively on six Saturdays during the year. The reason for two boards is quite simple: the fundraising of tax deductible donations. Under federal law, tax-deductible donations have to be handled differently than membership or general funds. So we have the ACLU-WV *Foundation* which collects and utilizes your tax-deductible gifts to support our legal and public education programs.

The American Civil Liberties *Union* of West Virginia is our membership organization that handles, among other duties, legislative lobbying and membership recruitment. Thus, we have two budgets with expenses and salaries divided between them in order to keep separate those donated funds that are tax-deductible.

Many ACLU affiliates have identical boards, while others have foundation boards with considerably different membership from their union group. We have elected to keep the membership of both boards almost the same, but we insure that they function as separate entities, each with its own budget and meeting agenda.

The people you elect will be serving on both boards. As members of the Foundation's board, they will be involved in our primary fund-raising activity, the Fund for Justice, which begins in April of each year after our annual Board retreat where we focus on fund-raising techniques. Our board members are an active lot and often travel some distance to come to our meetings, which we hold in different parts of the state as well as in Charleston. Let me urge you to vote if you have not yet done so for you are an important part of our success as the most

Calendars, T-Shirts Make  
Great Holiday Gifts!



If you are looking for a gift for a friend, colleague or family member, consider an ACLU calendar or an ACLU of WV t-shirt with artwork by Charley Hamilton. The sale of both of these items benefits the ACLU of WV Foundation.

Calendars are \$10, and t-shirts, which are available in both black and white, are \$12. To place an order, phone the ACLU of WV office at (304) 345-9246. These items are not tax deductible under IRS code 501(c)(3).

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Al and Millie Karlin

*Bill of Rights Dinner  
Clay Center  
Sept. 26, 2009*



Larry and Sandra Groce and Jeanne Chandler



Nunush and Majid Jaraiedi and Frank Calabrese



Mark Blumenstein and Ken Hechler



Bettijane Burger, Nahla Nimeh-Lewis and Sheila McEntee



Eli Rouse, Frank D'Abreo and Hameed Farook



Marilyn McGeorge and Harry and Kathe Deitzler



Kevin and Deborah Burgess and Dave and Lynn Pollard



Derek Harman and Sarah Sexton look at the totem poles and artwork at the Silent Auction.



Students from the High Rocks Academy and their guests



Terri Baur, Zuzana Zelinska and Sonya Armstrong

# ACLU of WV Foundation Legal Docket

By Terri Baur, Legal Director

## Stanley v. Rubenstein

A former prisoner who was refused permission to live with his fiancée while on parole is challenging both West Virginia's anti-cohabitation law and his subsequent parole to a program at a religious mission. The mission's religious program required him to engage in Bible study and complete quizzes in Bible-related subjects, memorize Bible verses, and attend an approved church in the community. The complainant argues that the anti-cohabitation statute is unconstitutional and that requiring him to participate in a religious program as a condition of parole violated his rights under the First Amendment.

## Evans v. Security America, Inc.

This case involves an employer's refusal to accommodate an employee's religious beliefs that prohibit her wearing men's clothing and retaliation for reporting sexual harassment. After she was hired, the employer permitted the employee to wear a skirt until shortly after she complained about the harassment, when she was told that she would be terminated if she did not wear uniform trousers. When she reported for work wearing a skirt, she was dismissed. A lawsuit filed in May 2007 alleges discrimination based on religion and gender, and retaliatory discharge.

## Hutchinson v. W.Va. State Police

Law enforcement officers executing a search warrant burst into the bathroom where a young woman was taking a shower. They refused to let her cover herself even after it was evident that she was not armed, dragged her into the living room by her hair, and forced her to lie naked on the floor for approximately 30 minutes in the presence of the other residents and a number of armed and masked male officers. The complaint alleges failure to train the officers and violation of plaintiff's Fourth Amendment right to be free of unlawful search and seizure and her right to privacy.

## Lee v. City of South Charleston

After complainant, an African American college student, stopped to watch a friend's traffic stop in the next block, a marked police car followed him out of a convenience store parking lot and trailed him, finally pulling him over for a minor violation. After complainant lawfully refused to consent to a warrantless search of his car, the officer made him and his passengers exit the car, handcuffed him, patted him down, unzipped his fly, and searched in his underwear. The roadside strip search took place in view of passing vehicles. The complaint alleges violation of the young man's Fourth Amendment right to be free of unlawful searches and seizures. The case was successfully settled on November 20.

## WVEA v. Kanawha County Board of Education

In this case, filed in the Circuit Court of Kanawha County on December 5, 2008, plaintiffs challenged the Board's policy mandating random suspicionless drug testing of the County's public school teachers and other employees. Plaintiffs sought a writ of mandamus, declaratory judgment, and injunctive relief, alleging the testing violated teachers' right to privacy and contravened West Virginia public policy. The WVEA also moved for and was granted permission to intervene in a separate action, *AFT et al. v. Kanawha County Board of Education, et al.* That

case was removed to federal court, and on December 29, 2008, the court enjoined enforcement of the policy pending trial. On August 11, 2009, the Board of Education voted to discontinue the random drug testing policy. On August 21, 2009, the Court entered a Consent Decree permanently enjoining enforcement of the random drug testing provisions of the policy.



## Associated Press v. Canterbury

The ACLU of West Virginia Foundation joined amici curiae Reporters Committee for Freedom of the Press, Association of Capitol Reporters and Editors, Radio and Television News Directors Association, Society of Professional Journalists, and West Virginia Press Association in support of the Associated Press. In 2008, the AP submitted requests under the West Virginia Freedom of Information Act for communications between Justice Elliot Maynard and Donald Blankenship during Justice Maynard's campaign for re-election. At the time, Massey Energy, of which Mr. Blankenship was President and CEO, had an appeal pending before the Court. The AP appealed the trial court's decision that several of the requested communications were not "public records." On November 12, 2009, the West Virginia Supreme Court of Appeals ruled that although e-mails are "writings" under the state's Freedom of Information Act, none of the 13 e-mails in question are public records because they do not relate to the conduct of the public's business.

## Brennan v. West Virginia State Police

Plaintiff sued for the return of her computer, alleging that it was searched and seized without a warrant. Officers went to plaintiff's home saying that there was a problem involving her minor daughter and a computer. Then, without plaintiff's knowing and informed consent, they viewed the contents of the computer and seized it, saying that although no crime had been committed they had to "clean up" the contents and would need to keep the computer for about six months and return it without the hard drive. When plaintiff sought the return of the computer, officers belatedly obtained a warrant. A satisfactory resolution to the case, including the return of plaintiff's computer, was achieved through negotiation.

## Charleston Town Center Co. v. Bumpus

In May 2009, the ACLU of West Virginia Foundation filed a brief amicus curiae in the West Virginia Supreme Court of Appeals in a case involving two African American teenagers. The young men were followed, harassed, and humiliated by Charleston Town Center Mall security staff, ejected from the mall, then arrested for trespassing while they attempted to wait for the mother of one of the youths on the sidewalk outside a mall restaurant. The ACLU's brief argues that the youths were subjected to racial profiling, which must be recognized as a factor in the denial of access to public accommodations. On November 17, 2009, the Court reversed the Human Rights Commission's findings that the youths were discriminated against because of their race.

# State Legislative Pregame Report for 2010

By **Seth DiStefano**, Field Organizer

Here at the office in Charleston, we've been gearing up for what promises to be another busy legislative session for civil liberties in West Virginia. Though the regular session of our state Legislature only lasts for 60 days, preparing for it is a year-round assignment that involves consistent research, evaluation of political trends, and continuous lobbying of legislators throughout the year. With only weeks to go before the session begins in January, here is where your affiliate sees a few key issues.

## Gay Rights

While West Virginia has enjoyed landmark progress in the area of gay rights over the last few years, the upcoming Legislature will see a shift in priorities as anti-equality forces prepare to do whatever it takes to enact their right-wing agenda. The results of the ballot initiative in Maine (which overturned the state's marriage equality laws) will have a direct impact on equal rights in WV. Ultra-conservative "faux family values" groups have been hard at work invading the churches of state lawmakers and pressuring them to support an unnecessary and divisive measure allowing for a majority vote on the "definition of marriage" in West Virginia. Simply put, civil libertarians and the friends of equal rights can expect an avalanche of out of state money to help push this one over the top. West Virginia represents the next best target for organizations who hang their hats on homophobic wedge issue advocacy. It will require our finest effort to defeat this measure once again.

And if a \$1.67 million special referendum on the "definition of marriage" isn't enough, we also anticipate a legislative campaign restricting foster parenting by LGBT persons to rear its ugly head. In response to a case in which the ACLU of West Virginia Foundation filed a friend of the court brief, the West Virginia Supreme Court of Appeals shot down an ill-advised decision by a Fayette County Circuit Judge who removed a foster child from two lesbian foster parents. Thankfully, the court recognized that West Virginia Code does not show preference for straight or gay persons when it comes to foster parenting. Unfortunately, this means that there will almost certainly be an effort to pass legislation restricting foster parenting and adoption for gay and lesbian West Virginians.

It is regrettable that West Virginia will open up the second decade of the 21<sup>st</sup> Century fighting over whether or not to relegate our gay and lesbian brothers and sisters to second class citizen status. Rest assured, however, that the ACLU and its membership are here to stand up for the rights of everybody.

## Racial Profiling

ACLU of West Virginia's campaign to end racial profiling has spent the spring, summer, and most of the fall hosting events across the state to raise awareness about citizens' rights when encountering law enforcement. In the next few weeks, we look forward to taking the next step with proposed legislation to address the issue of racial profiling in WV.

How does one legislate a solution to the damaging and illegal practice of racial profiling? The answer may very well have more

than one component and include elements of mandatory training for law enforcement officers and further protections from unnecessary searches of motorists on WV highways. Whatever the final outcome, ACLU of West Virginia is committed to using every weapon in our arsenal to make the policy changes necessary to address the concrete problem and disastrous effects of racial profiling in our communities.

## Reproductive Freedom

As I write this, forces on Capitol Hill have hijacked the healthcare debate to include what will surely be a bitter debate on whether women in this country will have control over their own medical decisions. Now that members of Congress have opened up a massive can of worms over an issue already long settled in federal law (the Hyde Amendment, re-approved every year, has long restricted federal funding of abortion) West Virginians can expect new life for the debate at the state level. Many will remember HB 3259 from the 2009 regular session of the state Legislature. The bill was shamefully put on the fast track by being intentionally assigned to just one committee (House Finance). After two weeks of intense lobbying by pro-choice advocates, the measure, thankfully, was never taken up for consideration. However, recent developments on Capitol Hill surrounding the issue of public funding of abortion will surely trickle down to the state level. We can expect and will be ready for another fight over this issue in 2010.

## Big Brother

Who knows what this legislative session will bring in the way of government intrusion into your private life. Whether it's laws mandating random and suspicionless government inspection of your urine, or a budget appropriation to keep the flat screen televisions running at the state's ambiguous fusion center. The ACLU of West Virginia will stay on top of legislative measures and fight to keep the government out of your personal business.

In many ways, all legislative initiatives bad for individual freedom come down to making a principled stand against big brother. Laws that target who you love or what medical decisions you make for yourself aren't just violations of equal protection under the law, they are horrendous violations of your privacy. It is not the government's business to tell you when or if to have children or what relationships will have recognition under the law.

## Conclusion

So that is where we see the major issues, but they won't stop there. Remember, only half of our legislative strength is drawn from a full time presence at the State Capitol. The rest and the most important element comes from you, the membership of the ACLU of WV. If you haven't saved February 8<sup>th</sup> on your calendar, please do so. Your presence at our annual lobby day is crucial element to our legislative success. Additionally, if you would like to come to the Capitol to lobby your legislators, we will gladly make appointments for you and accompany you on your visit, if you wish. Remember, when you take action during the session, you take ownership of your organization.

# Symposium on Community and Law Enforcement Relations Brings 120 Leaders, Residents Together



**(Top)** Sam Hickman and Paul Sheridan greet participants.  
**(Center left)** Matthew Bova, a law student who interned at the ACLU of WV Foundation this summer, presented opening remarks.  
**(Center right)** Kenneth Hale of the NAACP-WV delivers his comments during the panel discussion.  
**(Bottom)** Professor Chuck Smith, who is a board member of the ACLU of WV, welcomes two of the participants.

**(Top)** The symposium was very well attended and brought many different leaders and community residents together.  
**(Center)** Moderator Jim Haight presents a point during the discussion.  
**(Bottom)** Meshea Poore of the Kanawha County Public Defender's Office emphasizes the importance of law enforcement officers being involved in the lives of people in the community and knowing residents personally.

Over 120 community leaders, residents of the Charleston area, as well as faculty and students at West Virginia State University, joined together for a Symposium on Community and Law Enforcement Relations at WVSU on September 10. The symposium was sponsored by the ACLU of West Virginia Foundation, NAACP-WV Chapter, NASW-WV, Covenant House, and the WV Citizen Action Group.

The symposium was moderated by Jim Haight, editor of The Charleston Gazette, and it included four panelists: Chief Brent Webster of the Charleston Police Department, Meshea Poore of the Kanawha County Public Defender's Office, Dr. Stephen Haas of the WV Division of Criminal Justice Services, and Kenneth Hale of the NAACP-WV. The symposium created such meaningful discussion about law enforcement and community relations, race relations and racial profiling, that the ACLU of WV Foundation and the other sponsors hope to make it an annual event.



## Always Free? (Continued from page 1)

effect has overwhelmed the tax-paying public. The cost of one year's tuition, room and board (privately funded) at WVU = \$16,000; the cost of one year's tuition (publically funded) at Mount Olive Correctional Complex = \$24,000; the societal cost of a broken, fundamentally unfair criminal justice system = priceless. Yes Virginia, there is even a place for fiscal conservatives under the corrections reform tent.

Unfortunately the "tipping point" vividly illustrated in the recent Report to the Governor bears out virtually every statistical tragedy in the national numbers. Our state prison population is experiencing historic, explosive growth. Our minority citizens are significantly over-represented in the prison population. Non-violent drug offenders make up a disproportionate number of the people we incarcerate. Many within and without our state parole system would characterize it as dysfunctional, leaving people behind bars for lack of viable opportunities for rehabilitation or for return to the general population.

To be fair, the Commission's report does not gloss over all of these issues. Its recommendations incorporate strategies to identify categories of offenders who could be safely diverted from prison and re-integrated into productive roles in the community:

"Knowing three quarters of prison admissions in West Virginia are for non-violent, property and drug crimes, and knowing also that West Virginia has historically used community correctional services less than all but one state (older numbers), the Commission believes that by investing in all levels of community and institutional services, at least 500 offenders per year can be diverted."

The report also indicates that another 200 non-violent offenders per year could be diverted from hard time by reducing sentences. Perhaps most importantly, the Report acknowledges the need for sweeping reform of criminal statutes:

"Changes in the West Virginia Criminal Code that lengthened sentences and created new crimes and punishments for those crimes have been enacted every year for decades without proper planning for the

consequences. A complete review and overhaul of the Criminal Code of West Virginia to bring it to contemporary societal standards should be undertaken."

The Commission Report correctly notes that the criminal code is premised upon the assumption that crime can be deterred by more severe punishment. But according to the Commission, "...research indicates that community based sanctions or shorter prison terms with appropriate therapeutic services to address the social needs of the offender produce a reduction in recidivism compared to those simply kept longer in prison." Hurrah -- hopefully a watershed moment for corrections reform.

The Commission's findings vindicate studies showing there's no direct causal relationship between incarceration and crime reduction (some studies actually show the opposite effect for economically struggling communities which lose substantial numbers of their adult males). Moreover, the relationship between crime and punishment is more complex. Factors such as police practices, unemployment, drug trade, access to education, and the economy in general can significantly increase crime.

Just as important, lawmakers and law enforcement in WV must restore legitimacy and fundamental fairness to the criminal justice system by addressing racial profiling and the disparate effects of stop-and-search policing on minority populations. Sentence disparities which impact negatively on persons of color must be eliminated. Those who believe in the legitimacy of a system of laws are more likely to abide by them. The recommended rewrite of the Criminal Code is a must-do, and should be at the top of the Legislature's agenda in January.

Since West Virginia's beleaguered corrections system mirrors that of other states as well as the federal system, the feasible solutions to our problems are substantially similar. We can more effectively address overcrowding by immediate implementation of diversion strategies, treatment, and rehabilitation for non-violent offenders. We can fix the broken parole system. As a society we simply cannot afford, fiscally or otherwise, to try to build (prisons) our way out of this urgent problem which was decades in the making. If we build it, we will fill it.

## ACLU of WV Foundation Presents Free Showing of Film American Violet



Nearly 120 people attended the ACLU of WV Foundation's free showing of the film, *American Violet*, at the West Virginia State University Capitol Center Theater on Friday, November 6 in Charleston. This film is based on true events and tells the astonishing story of a 24-year-old African American mother of four young girls in a small Texas town who struggles to clear her name after being wrongly accused for dealing drugs in November 2000 after a paramilitary drug sweep of her housing project.

*American Violet* was shown as part of the ACLU of WV Foundation's continuing Campaign to End Racial Profiling. This movie was also the first film shown for the Fall International Film Festival in Charleston.



(Above left) Chiqita Shelton and her granddaughter.

(Above right) Harvey and Naomi Cohen visit with Paul Sheridan after the film.



(Left) Frank Crabtree and Mel Hoover.

# *Upcoming Events - ACLU of WV*

**ACLU of WV Membership Meeting and Super Bowl Pregame Gathering  
Sunday, February 7, 2009  
Woman's Club of Charleston  
2 p.m. - 6 p.m.**

- ◆ Light refreshments and hors d'oeuvres will be available
- ◆ Speakers to be announced
- ◆ Multiple opportunities to watch the big game directly after festivities are finished

**ACLU of WV Lobby Day at the State Capitol  
Monday, February 8, 2009**

- ◆ Join civil libertarians from across the state and take action on our legislative priorities
- ◆ Take ownership of your organization by lobbying on the issues that matter to civil liberties

Please RSVP to one or both events by calling 304.345.9246 or by email: [mail@acluwv.org](mailto:mail@acluwv.org)



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